No. 95-1794

In The

Supreme Court of the United States

October Term, 1995

THOMAS MASOTTO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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ARGUMENT

I. Section 924(c) does not bring within its reach individuals who did not actively use a weapon.[1]

The government makes two arguments in opposition. The government first argues that "[n]othing in *Bailey* [*v. United States*, 116 S. Ct. 501 (1995)] casts doubt on the proposition that a defendant, either under *Pinkerton* or as an aider and abettor, may be convicted of a [18 U.S.C. §] 924(c) offense based on the active use of a weapon by someone else." Opp. 7.

But *Bailey* does just that: by rejecting the so-called "fortress theory" of "constructive" knowledge and use of weapons by codefendants who had no actual knowledge of the weapons or who did not actually use the weapons,

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[1] Contrary to the government's argument, the scope of 18 U.S.C. § 924(c) liability under *Pinkerton v. United States*, 328 U.S. 640 (1946), and under an aiding and abetting theory was an issue raised below. *See United States v. Masotto*, 73 F.3d 1233, 1239-42 (2d Cir. 1996) (rejecting Masotto's arguments that *Pinkerton* instruction should not have been given in connection with § 924(c) charge, that aiding and abetting instruction improperly permitted § 924(c) conviction based on mere knowledge, and that evidence was insufficient to support § 924(c) conviction on either *Pinkerton* or aiding and abetting theories of liability); *compare United States v. Peeples*, 70 F.3d 1275, 1995 WL 703729, at **1-5 (7th Cir. 1995) (rejecting defendant's argument that evidence for § 924(c) conviction was insufficient and that government improperly relied on § 924(c) "fortress" theory of liability) *with Peeples v. United States*, 116 S. Ct. 1844 (1996) (mem.) (granting Peeples' petition for certiorari, vacating Peeples' § 924(c) conviction, and remanding to Seventh Circuit "for further consideration in light of *Bailey v. United States*, 116 S. Ct. 501 (1995)").

Bailey radically altered the landscape of § 924(c) "use" liability. Liability under § 924(c), the Court held, could only be predicated on *active*, not *passive*, use of a weapon.

Where a codefendant does – but the defendant does not – know about, possess, and brandish or otherwise actively employ a weapon, the defendant's "use" of the weapon could not be more "passive." Such "use" is indistinguishable from the mere "inert presence of a firearm," *Bailey*, 116 S. Ct. 508, this Court found insufficient to trigger § 924(c) liability. Imposing vicarious liability upon the defendant fails to effectuate the sentence-enhancing[2] function of § 924(c) – to punish more severely an individual who actually uses a firearm.

The government chides us for misrepresenting the record. Opp. 9 & n.3. We stand by our statement. There was evidence Mr. Masotto knew *generally* that the so-called "crew" carried guns during truck robberies, Pet. 18a, and that he knew "crew" member Lucas at times carried a gun, Pet. 4-5. There was *no evidence*, however, that Mr. Masotto knew any gun would be used in connection with the All-Pro Air Delivery Service truck hijacking that was the predicate offense in the § 924(c) count on which he was convicted. Pet. 4-5. The government has misstated the facts by suggesting[3] that Mr. Masotto knew guns would be used in the All-Pro hijacking. The Second

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[2] *See* Pet. 7 & n.3.

[3] The government is careful never to state explicitly that Mr. Masotto knew guns would be used in the *All-Pro* truck hijacking, only that he knew "crew" members had used guns during *"truck robberies."* *See* Opp. 5-6, 9 & n.3 (emphasis supplied).

Circuit's opinion states only that use of a gun at the All-Pro hijacking "was foreseeable to Masotto, based on Lucas' testimony that Masotto knew crew members carried guns during the truck robberies," Pet. 18a. Thus, the question we have presented is firmly based on the record and on the judgment and opinion below.

The government's second argument is equally unavailing. It argues "there is no sound reason" why *Pinkerton* and aiding and abetting should be less applicable to § 924(c) offenses than to "the other diverse crimes proscribed by federal criminal law." Opp. 7. But, as *Bailey* suggests, there *are* sound reasons to preclude liability when a defendant's only involvement with a weapon is attenuated.

First, as this Court has indicated, § 924(c) is a sentence enhancer,[4] not a substantive criminal offense – it increases punishment when a deadly weapon is used to commit a substantive offense.

Second, as *Bailey* suggests, the Congress *intended* § 924(c) liability to extend only to those individuals who actually used a weapon in the commission of a crime, not to those who merely knew about the weapon or to whom the weapon may have given courage or comfort. *See Bailey*, 116 S. Ct. at 507-08.

The current consensus among courts of appeals that have addressed the issue of the availability of § 924(c) *Pinkerton* and aiding and abetting liability hardly counsels against certiorari. Indeed, the circuit courts had all

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[4] *See* Pet. 7 n.3.

but unanimously accepted the "fortress" and "constructive" theories of § 924(c) liability when *Bailey* was decided. The Court has remanded many of these decisions to the circuit courts for further consideration in light of *Bailey*.[5]

II. Omitting an offense element is a structural defect not subject to harmless-error analysis.

While *Reves v. Ernst & Young*, 507 U.S. 170, 178, 184 (1993), required a finding of management or direction of an enterprise as a precondition for conviction under 18 U.S.C. § 1962(c), the trial court permitted conviction based solely upon the government's proof that Mr. Masotto's unlawful acts "in some way related to the activities of the enterprise" or that he "was able to commit the acts solely by virtue of his position or involvement in the enterprise."

The government argues harmless-error analysis properly was applied below, notwithstanding the admitted error in the § 1962(c) instruction, because "[t]here can be no doubt . . . that the jury would have returned the same guilty verdict even if it had [been properly

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[5] *See Peeples*, 116 S. Ct. 1844; *Olds v. United States*, 116 S. Ct. 1667 (1996) (mem.); *Rhodes v. United States*, 116 S. Ct. 1562 (1996) (mem.); *Allen v. United States*, 116 S. Ct. 1411 (1996) (mem.); *Wingo v. United States*, 116 S. Ct. 1345 (1996) (mem.); *Wingo v. United States*, 116 S. Ct. 1346 (1996) (mem.); *Aikens v. United States*, 116 S. Ct. 1346 (1996) (mem.); *Smith v. United States*, 116 S. Ct. 1314 (1996) (mem.); *Hawkins v. United States*, 116 S. Ct. 1257 (1996) (mem.); *Santos v. United States*, 116 S. Ct. 1038 (1996) (mem.); *Lamb v. United States*, 116 S. Ct. 1038 (1996) (mem.); *Hines v. United States*, 116 S. Ct. 1038 (1996) (mem.).

instructed]." Opp. 10-11. This is so, the government asserts, because " 'the evidence at trial indicated that [petitioner's] only role within the crew was that of a leader. Therefore, the jury only could have found that [petitioner] either was the leader of the crew or was not a crew member at all.' " *Id.* at 10 (quoting Pet. 11a).

The government's argument, however, begs the question Mr. Masotto has raised in his Petition: while the government and the Second Circuit concluded that the evidence "indicated" Mr. Masotto was a leader of the "crew," other evidence "indicated" he was not. *See* Pet. 3-5.

Whether *in fact* Mr. Masotto was a "director" or "manager" of an enterprise in the *Reves* sense was an issue the Constitution left to the jury. Thus, while the government's argument and the Second Circuit's holding

> can tell us that the verdict could have been the same without the [instructional error], when there was evidence sufficient to support the verdict independently of the [error's] effect[, it] will not tell us whether the jury's verdict *did* rest on that evidence as well as on the [instructional error]. . . .

Yates v. Evatt, 500 U.S. 391, 407 (1991) (emphasis supplied).

When a trial court's jury instruction, however, unconstitutionally forecloses the jury from considering a critical factual issue, as it did here, it is a structural defect, and "[t]he most an appellate court can conclude is that a jury *would surely have found* the petitioner guilty beyond a reasonable doubt – not that the jury's actual finding of guilty beyond a reasonable doubt *would surely not have been different* absent the constitutional error. That is not

enough," *Sullivan v. Louisiana*, 113 S. Ct. 2078, 2082 (1993) (emphasis in original).

These are the principles the courts of appeals have struggled[6] to apply in the context of element-omitted instructions.[7]

Respectfully submitted,

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[6] While the government suggests the conflict among the circuits on the applicability of harmless-error analysis to element-omitted instructions is minimal, the circuit courts have not shared this sentiment. *See United States v. Kerley*, 838 F.2d 932, 939 (7th Cir. 1988); *Hoover v. Garfield Heights Municipal Court*, 802 F.2d 168, 176-77 (6th Cir. 1986), *cert. denied*, 480 U.S. 949 (1987); *see generally* Pet. 15-17 & nn.8-11. The opinions even within some circuits are in conflict. *See Kerley*, 838 F.2d at 939 (noting inconsistency in Fifth Circuit); Pet. 16 at n.10 (noting inconsistency in Second Circuit).

[7] The government's purported distinction between instructions that omit an element and instructions such as the one given by the trial court below – which lowered the factual ceiling for conviction – is artificial at best. *See Kerley*, 838 F.2d at 939. For purposes of satisfying the sixth amendment, a jury erroneously instructed to convict even though it has failed to find an offense element beyond a reasonable doubt is not constitutionally different from a jury that has received no instruction on one of the offense elements. In either case, the jury's constitutional role has not been fulfilled, and the appellate courts are constitutionally barred from stepping into the jury's shoes.